UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of COUNTY AMBULANCE, INC. Employer and INTERNATIONAL ASSOCIATION OF EMT'S & PARAMEDICS (IAEP), NATIONAL ASSOCIATION OF GOVERNEMENT EMPLOYEES (NAGE), SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) Petitioner	Case 1-RC-21555

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is an ambulance service located in Ellsworth, Maine. The Petitioner seeks a unit of all full-time and regular part-time EMTs (including per diem employees working an average of four hours or more per week), EMT intermediates, EMT paramedics, first responders, and drivers employed by the Employer. The parties have stipulated to the appropriateness of this unit.[1] There are approximately 40 employees in the unit. The only issue litigated at the hearing concerned the supervisory status of paramedics Robert Lipari and Kevin De Prenger. The Employer contends that they are supervisors within the meaning of the Act and should be excluded from the unit, while the Petitioner maintains that they are employees. I find that the Employer has not met its burden of demonstrating that they are supervisors within the meaning of the Act, and I will include them in the unit.

Lipari and De Prenger, who share the job title of "supervisor," report to managers Bruce Washburn and Dave Dostie, who in turn report to the Employer's president, John Partridge. As of the time Washburn and Dostie were hired in April 2002, Lipari and De Prenger appear to have been in their current jobs for several years.

The Employer operates its ambulance service 24 hours a day, seven days a week. Two unit employees are on duty at night. The record does not reveal with precision how many are on duty during the day, but since the Employer appears to have only several vehicles ready for operation during the day, the number would appear to be only a fraction of the total employee complement. Washburn and Dostie work days, normally Monday through Friday. However, they are always on call and may be reached through their pagers. Lipari and De Prenger also appear normally to work during the day on a Monday through Friday schedule, but the record does indicate that they sometimes work on a Saturday or Sunday.

The assignment of employees to a particular vehicle is determined on a daily basis. This determination is made by the managers, if they are available, and otherwise by the supervisors. There was no record evidence to demonstrate how the disputed employees exercised any independent judgement in this regard, nor how, if at all, the assignment has an impact on employees' terms of employment. The managers also decide which of these teams will be sent to answer a particular call for service, but if they are unavailable, the supervisors will make this decision. Paramedic Daniel Landers, who in the past has made such assignments for the Employer, testified that the making of these assignments only involves the exercise of standardized decisions, principally matching the medical needs of the patient being transported with the employees having the licensure required to treat those needs.[2] Washburn, who was called by the Employer,

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[1] The parties have stipulated, and I find, that to be eligible to vote in the election an employee must have worked an average of four hours or more per week in the quarter immediately preceding the filing of this petition.

[2]After Landers testified, the Employer's attorney announced on the record that he would contend that Landers is a statutory supervisor, and he renewed this contention in his brief. In addition to the inadequacy of the record as to the current job duties of Landers, the parties at the outset of the

agreed that making these assignments was "for the most part" routine, but added that "there are some gray areas that judgment calls are made." However, he failed to explain what he meant by "gray areas" and how, if at all, they require the use of independent judgment.

If the scheduled employees are insufficient to meet the demands for the Employer's services on a particular day, the supervisors have authority, if the managers are unavailable, to call off-duty employees and request that they work. There is a list of employees who are willing to work nights outside their regular schedules. They must be called first for night work, but otherwise the supervisors may request whom they wish. Washburn testified that, "Generally, [when] we're looking for extra people, we're looking [for] anybody that's willing to come in."

With respect to discipline, Washburn testified that, if "an employee was to be outside of the bounds of County Ambulance policy or standard operating procedures they [Lipari and De Prenger] would be expected to either call them to task or to bring it to management attention so it could be dealt with." As far as the record shows since Washburn and Dostie were hired, there has only been one instance of discipline, a discharge, and the supervisors do not appear to have been involved in the decision to take this action. De Prenger testified that about three years ago he recommended on two different occasions that an employee be discharged, but that the Employer did not follow either recommendation. De Prenger also testified that he had counseled employees on about a dozen occasions in the past, but that the most recent of these incidents was about three years ago.

Washburn testified that there had been several new hires made since he and Dostie began their employment with the Employer, but that the supervisors had had no role in the making of these hiring decisions.[3]

Washburn testified that the supervisors have the authority to let employees go home early "when it's extremely slow."

The supervisors are paid an hourly wage rate. They receive $0.75 an hour more than the other paramedics.

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hearing agreed that the only issues for litigation were the status of Lipari and De Prenger. Accordingly, I find that Landers should be allowed to vote under challenge.

[3] Washburn also testified that on one occasion last summer he asked Lipari and De Prenger whether they recommended rehiring an employee who had quit but then had regretted this decision. However, Washburn indicated that he did this "because I -- hadn't been with the Company that long and did not [know] all the history…." He also asked other employees whether they would take this applicant back. While he asserted that his ultimate decision to rehire the individual was "at least partially" based on the recommendation of Lipari and De Prenger that the person be rehired, he did not disclose the relative weight which their opinion was given in making his decision.

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*[4] The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*[5] The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care, Inc.*[6] The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*[7]

I find that the Employer has failed to meet it s burden of demonstrating the supervisory status of the disputed employees. The record evidence only tends to establish that the supervisors' role with respect to work assignments is of a routine nature. Washburn's assertion that there are "gray areas" that require the use of independent judgment in the making of work assignments merely states a conclusion and is not evidence. *Sears, Roebuck & Co;*[8] *Advanced Mining Group*.[9] It appears from Washburn's testimony that, for the most part. no judgment at all is exercised by the supervisors when they attempt to have off-duty employees report to work when the Employer experiences an unexpectedly large workload, since any off-duty employee is normally acceptable and there is no evidence of a mandatory element. To the extent that they might have to exercise judgment in calling in off-duty employees, all that appears from the record is that it would involve the same standardized matching of the patient's needs to the employee's licensure, which the supervisors perform with respect to the regularly scheduled employees.

I find the Employer's evidence of disciplinary authority by the disputed employees to be inadequate to demonstrate supervisory status. Merely reporting misconduct or inadequate job performance to the management without the effective

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[4] 273 NLRB 1677, 1689 (1985).

[5] 175 NLRB 871 (1969).

[6] 532 U.S. 706, 710-712 (2001).

[7] 308 NLRB 101, 102 (1992).

[8] 304 NLRB 193 (1991).

[9] 260 NLRB 486, 507 (1982).

recommendation of discipline is not a supervisory act. *NLRB v. City Yellow Cab Co;*[10] nor is the counseling or reprimanding of employees that is without tangible effect on job status or tenure evidence of statutory supervisory authority. *Passavant Health Center.*[11] The current managers appear to have excluded the supervisors from any role in the hiring process, with the only apparent exception being due to the newly hired managers not being fully familiar with the work history of an applicant who had previously worked for the Employer. Even with respect to the minor function of permitting employees to leave work before their scheduled quitting time, the supervisors lack any real discretion because they may only do this when business is "extremely slow."

Therefore, I find that Lipari and De Prenger are employees and are included in the stipulated unit.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time (including per diem employees working an average of four hours or more per week), EMTs, EMT intermediates, EMT paramedics, first responders and drivers employed by the Employer from its Ellsworth, Maine location, but excluding all other employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off and who worked an average of four hours a week in the quarter immediately preceding September 25, 2002. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by International Association of EMT's & Paramedics (IAEP), National

[10] 344 F2d 575. 580-581 (6th Cir. 1965).

[11] 284 NLRB 887, 889 (1987).

Association of Government Employees (NAGE), Service Employees International Union, (SEIU).

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior underwear, Inc;*[12] *NLRB v. Wyman-Gordon Company.*[13] Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility.*[14] In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before October 29, 2002. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

[12] 156 NLRB 1236 (1966*).*

[13] 394 U.S. 759 (1969).

[14] 315 NLRB 359 (1994).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 5, 2002.

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Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 22nd day of October, 2002.

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